SERVED: December 10, 1999

NTSB Order No. EA-4806

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 10th day of December, 1999

JANE F. GARVEY, Administrator, Federal Aviation Administration, Complainant, v. LINDA C. CORRIGAN, Respondent.	Docket SE-15764

OPINION AND ORDER

The Administrator has appealed from the oral initial decision Administrative Law Judge William E. Fowler, Jr., rendered in this emergency revocation proceeding on November 10, 1999, at the conclusion of an evidentiary hearing.[1] By that decision, the law judge reversed an emergency order of the Administrator that revoked the respondent's mechanic certificate

[1]An excerpt from the hearing transcript containing the initial decision is attached.

for her alleged refusal to submit to a drug test, in violation of section 65.23(b) of the Federal Aviation Regulations, "FAR," 14 C.F.R. Part 65.[2] Because we have determined that the law judge erred in not granting a motion the Administrator had filed to dismiss respondent's appeal as untimely, we will vacate the initial decision and dismiss the respondent's appeal.[3]

The Administrator's September 17, 1999 Emergency Order of Revocation alleges the following facts and circumstances concerning the respondent:

1. You are now, and at all times mentioned herein were, the holder of Mechanic Certificate number 48429296, issued under Part 65 of the FAR.

2. At all times mentioned herein, you performed aircraft maintenance or preventive maintenance duties for Federal Express, the holder of an air carrier operating certificate and appropriate operations specifications issued under Part 121 of the FAR.

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[2]FAR section 65.23(b) provides as follows:

§ 65.23 Refusal to submit to a drug or alcohol test.

* * * * *

(b) Refusal by the holder of a certificate issued under this part to take a drug test required under the provisions of appendix I to part 121 or an alcohol test required under the provisions of appendix J to part 121 is grounds for—

(1) Denial of an application for any certificate or rating issued under this part for a period of up to 1 year after the date of such refusal; and

(2) Suspension or revocation of any certificate or rating issued under this part.

[3]Although the respondent, pro se, filed a reply opposing the Administrator's appeal, it does not undertake to respond to the issues presented by the Administrator on appeal concerning either the validity of the law judge's decision on the evidence or the correctness of his denial of the Administrator's motion to dismiss her appeal as untimely. Rather, it merely restates positions respondent took at the hearing, without regard to their relevance to the Administrator's arguments on appeal.

3. At all times mentioned herein, an employee who performs maintenance or preventive maintenance is performing a covered function, as prescribed in Part 121, Appendix I, Section III (14 C.F.R. Part 121, App. I, § III.).

4. On or about February 12, 1999:

   a. You reported for random drug and alcohol testing at the collection site designated by your employer, Federal Express.

   b. You told the collection site person, Medical Collector Kathy Crawford, that you had just used the restroom and were at present unable to void.

   c. The collection site person instructed you to begin drinking water, which you did.

   d. When you indicated you were ready to void, the collection site person instructed you to wash your hands and provided you with a sterile container in which to provide your specimen.

   e. When you were not able to provide a specimen, you resumed drinking water.

   f. When you indicated for the second time that you were ready to void, the collection site person again instructed you to wash your hands and provided you with a sterile container in which to provide your specimen.

   g. When you were not able to provide a specimen, you resumed drinking water.

   h. When you indicated for the third time that you were ready to void, the collection site person again instructed you to wash your hands and provided you with a sterile container in which to provide your specimen.

   i. You returned to the collection site person with a substance in the container that you purported to be your urine specimen.

   j. In your presence, the collection site person split the specimen into two containers and sealed both containers with tamper-evident seals, upon each of which was pre-printed specimen number 1176186.

k. In the collection site person's presence, you completed Step 4 of the Federal Drug Testing Custody and Control Form (custody and control form) for your specimen, upon which was also printed specimen number 1176186.

l. By signing in the space provided in Step 4, you verified that you provided your urine specimen to the collection site person; that you did not adulterate your urine specimen in any manner; that each specimen bottle was sealed with a tamper-evident seal in your presence; and that the information provided on the custody and control form and on the label affixed to each of your specimen bottles was correct.

m. In your presence, the collection site person completed Step 5 of the custody and control form for specimen number 1176186. By doing so, the collection site person certified that the specimen identified on the custody and control form was the specimen presented to her by you; that it bore the same specimen number as the specimen number on the custody and control form; and that it was collected, labeled, and sealed in accordance with applicable Federal requirements.

n. On February 19, 1999, testing conducted by SmithKline Beecham, a Department of Health and Human Services-certified Federal Drug Testing Laboratory, revealed that specimen number 1176186 was adulterated, in that in contained excess levels of nitrite.

o. Nitrite is a substance that is commonly marketed to, and used by, persons attempting to conceal the presence of drug metabolites in urine by introducing nitrite into the urine specimen.

p. Accordingly, on February 19, 1999, SmithKline Beecham completed Step 7 of the custody and control form for specimen number 1176186, indicating that the specimen was adulterated because the level of nitrite in the specimen was too high.

q. By signing in Step 7 of the custody and control form for specimen number 1176186, Certifying Scientist Junko N. Otte of SmithKline Beecham certified that the specimen identified by the laboratory accession number on the custody and

control form was the same specimen that bore specimen number 1176186; that the specimen was examined upon receipt; was handled and analyzed in accordance with applicable Federal requirements; and that the results set forth on the custody and control form were for that specimen.

r. On February 25, 1999, you were notified of the test results with respect to specimen number 1176186 by the office of the Medical Review Officer (MRO) for Federal Express.

s. On February 25, 1999, Federal Express MRO A. Lesser, M.D., completed Step 8 of the custody and control form for specimen number 1176186, indicating that he had reviewed the laboratory results for specimen 1176186 in accordance with applicable Federal requirements, and that he had determined that drug testing was not performed on the specimen because it was adulterated.

5. By reason of the above-described facts and circumstances, you engaged in conduct that clearly obstructed the testing process, in that you submitted a substance that was not your own urine during random drug testing conducted in accordance with Part 121, Appendix I.

6. Your conduct in paragraphs 4 and 5, above, constitutes a refusal to submit to a random drug test, as the term "refusal" is defined in Part 121, Appendix I, Section II (14 C.F.R. Part 121, App. I, § II.).

The law judge appears to have determined that the Administrator failed in her burden of proof in this case because the asserted presence of a few co-workers in the vicinity of the testing area around the time she gave a specimen allowed for the possibility that someone other than respondent might have adulterated her urine specimen.[4] The Administrator urges us to find that the law judge erred in so holding. Although our conclusion that the law

[4]There is no evidence in the record that anyone with or without a motive or reason to affect respondent's drug testing was observed to have engaged in any activity that would support

judge should have granted the Administrator's motion to dismiss the late appeal obviates the need for us to reach the merits of this controversy, we think several observations concerning the proof in this record are appropriate.

As the Administrator's brief amply and meticulously demonstrates, she advanced more than enough evidence to establish that respondent must have adulterated her specimen, given the collector's constant surveillance of the area and her essential adherence to proper drug testing procedures under Department of Transportation (DOT) regulations. The respondent, on the other hand, neither produced any evidence demonstrating that anyone was observed near any of the containers used to process her sample, before or after she gave one, nor identified any DOT regulation that the collector failed to observe. She did not, in short, produce any evidence, circumstantial or otherwise, which would support a finding that the integrity of her specimen had been compromised.

In these circumstances, the law judge's apparent belief that any doubt respondent may have raised concerning the chain of custody of the urine sample before it was sent to the testing facility justified reversal of the Administrator's charge, no matter what the strength of the evidence that refuted the possibility, must rest on some unarticulated, and unlitigated, supposition about the requirements of DOT regulations, for it finds no sound basis in the law of evidence applicable to a civil

(..continued)
such a theory.

or an administrative proceeding. In this regard, we note that while the law judge was willing to indulge, with dispositive effect, respondent's argument that someone else could have adulterated her urine sample, he did not find that her denial of having done so herself should be credited.

In her motion to dismiss the respondent's appeal from the emergency revocation order as untimely, to which the respondent filed no answer, the Administrator asserted that the respondent's appeal was tardy because it was due on September 27, 1999, 10 days after it was served on September 17, but was not mailed to the Board until September 30.[5] In this connection, the Administrator noted that the respondent did not receive the order until September 21, when she signed for a certified copy of it delivered to her residence, but asserted that the time limit should be computed from the 17th, not the 21st, because Section 1005(c) of the Federal Aviation Act of 1958, as amended, and subsequently recodified at 49 U.S.C. Section 46103(a)(2), specified that "[w]henever service is made by registered or certified mail, the date of mailing shall be considered as the time when service is made."

Because he questioned the applicability to an enforcement case of the statute cited by the Administrator, the law judge in his October 15, 1999 order declined to apply the date of mailing

[5]Respondent did not, as advised in the emergency revocation order, serve a copy of her appeal to the Board on the Administrator.

as the service date.[6] Instead, he ruled that longstanding Board precedent controlled the issue, and that precedent, namely, a line of cases beginning with Administrator v. Hayes, 1 NTSB 1694 (1972), held that the service date of the revocation order was the date when respondent received it, whether constructively or in person. This sua sponte ruling was clearly erroneous. The Hayes case, and the several subsequent cases that followed it, concluded that general law principles on service should be utilized with respect to service of the Administrator's orders only because the Administrator had identified no rule of law with respect to their service. Having now done so, the premise for the Hayes approach is no longer valid.

We share the law judge's consternation over the Administrator's failure to assert, at least until very recently, the cited provision of the Federal Aviation Act as controlling on the matter of service of her orders.[7] Nevertheless, the fact that the Administrator could or should have identified the

[6]A copy of the law judge's order is attached.

[7]Counsel for the Administrator's suggestion that the Board has in the past "overlooked" the relevant section of the statute reflects, at best, a misapprehension of the Board's role in these proceedings. Within the context of a mandate to ensure that the Administrator's orders are required in the interests of aviation safety, the Board serves as a neutral adjudicator of the Administrator's charges against airmen, among others, not as an advocate for any party. We expect, much like a court does, that the parties will fully inform us of their views as to the laws relevant to the factual and legal disputes we are authorized to resolve on review of the Administrator's orders, and not anticipate that we will do their research for them. In this regard, counsel for the Administrator has not identified a single Board case that followed Hayes on service despite the advice or argument that the Federal Aviation Act dictated a different result.

provision earlier has no bearing on the Board's obligation to comply with it now. The Board has no stake in precedent shown to be contrary to a relevant rule of law, and the respondent does not argue that the Administrator is mistaken in her position on the question of service. Rather, respondent asserts only that she thought she had 10 days from receipt of the Administrator's order to file her appeal.[8] Because respondent's mistake in this connection does not constitute good cause under Board precedent,[9] her appeal should have been dismissed as untimely on the Administrator's motion. See Administrator v. Hooper, 6 NTSB 559 (1988).

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted;

2. The initial decision is vacated; and

3. The respondent's appeal is dismissed.

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[8]The Administrator's order advised that she had 10 days "from the date [of the order's] service," and was accompanied by a certificate certifying service on the 17th day of September.

[9]See, e.g., Administrator v. Juda, NTSB Order No. EA-4740 (1999); Administrator v. Shultz, NTSB No. EA-3471 (1992); and Cutts v. Administrator, NTSB Order No. EA-3568 (1992).

Notation 7218, Administrator v. Corrigan, Docket SE-15764

JOHN GOGLIA, Member, dissenting:

I find the Administrator's effort to have this case dismissed on a procedural basis to be a transparent attempt to avoid the adverse decision on the merits the law judge dealt her, and I think it shameful that the change of position has been advanced in a case with a pro se respondent. In the absence of a full and persuasive accounting of the reasons why the Administrator has not, for the past 40 plus years, specified the rule on service pressed as applicable here, I would continue to follow Board precedent. The respondent should not be penalized for her understandable assumption that the deadline for filing an appeal from the Administrator's order ran from the date she received it. There is clear indication from the record that the respondent intended to appeal the Administrator's order in a timely manner by responding within ten days of receipt of the order.

Although the majority opinion points out the strength of the Administrator's position that the Respondent adulterated her specimen, I believe that deference should be afforded to the Law Judge in his determination that the Respondent's argument had merit. This case unquestionably turns on the judge's credibility determinations in accepting the testimony of the Respondent and rejecting as not credible the testimony of the person who collected the urine sample. The Board has often and clearly stated that it gives deference to the credibility determinations of the law judge, who is in the best position to observe the demeanor of the witnesses, and that such determinations can only be challenged when they are inherently incredible and/or inconsistent with the overwhelming weight of the evidence, which is not the case here.

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